

2007 WL 5746665 (Ariz.App. Div. 1) (Appellate Brief)
Court of Appeals of Arizona, Division 1.

In the Matter of the Estate of Emmett C. WYTTENBACH, Deceased.
Nona Wyttenbach, Surviving Spouse of Decedent, Appellee,
Barry D. Wyttenbach, Personal Representative of the Estate of Emmett C. Wyttenbach, Appellant.

No. 1 CA-CV 07-0012.
February 20, 2007.

Court of Appeals Division One Maricopa County Superior Court No. PB 2002-003780

Appellant's Opening Brief

Thomas J. Shumard, SBN 002511, 4715 North 32nd Street, Suite 105, Phoenix, Arizona 85018, Attorney for Appellant.

***i TABLE OF CONTENTS**

TABLE OF CITATIONS	iv
ABBREVIATIONS	vi
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	3
ISSUES PRESENTED	7
ARGUMENTS	8
I. The Trial Court Erred in Granting Defendant's Motion for Summary Judgment	8
A. Standard of Review.	8
B. Arguments	8
II. The Statute of Limitation Did Not Bar The Personal Representative From Filing The Complaint.	10
A. Standard of Review.	10
B. Arguments	11
III. The Trial Court Abused Its Discretion In Not Allowing The Personal Representative To Amend The Complaint to Add a Party Plaintiff	12
A. Standard of Review.	12
B. Arguments	12
CONCLUSION	13
* ii CERTIFICATE OF COMPLIANCE	14
CERTIFICATE OF SERVICE	14
APPENDIX	15
<i>Exhibits</i>	
1. Affidavit for Transfer of Title to Real Property 8-21-02	ROA 1
2. Renunciation of Right to Appointment as Personal Representative and Consent to Appointment of Personal Representative Without Bond	ROA 3
3. Renunciation of Right to Appointment as Personal Representative and Consent to Appointment of Personal Representative Without Bond	ROA 4
4. Order of Formal Probate of Will and Appointment of Personal Representative Without Bond 5-24-04	ROA 8
5. Petition and Complaint 8-13-04	ROA 13
6. Personal Representative's Opposition to Petition for Removal of Personal Representative 6-2-05	ROA 21
7. Plaintiff's Opposition to Defendant's Motion for Summary Judgment 11-10-05	ROA 43
8. Instrument of Distribution 3-10-06	ROA 56
9. Motion for Summary Judgment 5-4-06	ROA 58
* iii 10. Statement of Facts in Support of Response to Motion for Summary Judgment 5-30-06	ROA 59

11. Response to Motion for Summary Judgment 5-30-06 ROA 60
12. Petition to Amend Complaint 6-2-06 ROA 61
13. Minute Entry Ruling 6-27-06 ROA 64
14. Order 10-26-06 ROA 74

***iv TABLE OF CITATIONS**

Cases

<i>Andrews v. Blake</i> , 205 Ariz. 236, 69 P.3d 7 (2003)	8
<i>Berry v. Alberty</i> , 137 Ariz. 387, 843 P.2d 1279 (App. 1992)	8
<i>Bishop v. State Dep't of Correction</i> , 172 Ariz. 472, 837 P.2d 1207 (App. 1992)	12
<i>City of Tucson v. Clear Channel Outdoor, Inc.</i> , 209 Ariz. 544, 105 P.3d 1163 (2005)	12
<i>Corbett v. Manorcaren of America</i> , 213 Ariz. 618, 146 P.2d 1027 (2006)	11
<i>Estate of Mary Winn</i> , 212 Ariz. 117, 128 P.3d 234 (App. 2006)	passim
<i>Estate of Mary Winn</i> , 214 Ariz. 149, 150 P.3d 236 (2007)	passim
<i>Great Am. Mortgages Ins. Co. v. Statewide Ins. Co.</i> , 189 Ariz. 123, 938 P.2d 1124 (App. 1997)	10
<i>Johnson v. Johnson</i> , 195 Ariz. 389, 988 P.2d 612, 623 (App. 1999)	10
<i>Lowry v. Industrial Commission of Arizona</i> , 195 Ariz. 398, 989 P.2d 152 (1999)	9
<i>Owens v. Superior Ct.</i> , 133 Ariz. 75, 79, 649 P.2d 278, 282 (1982)	12
<i>Spitz v. Bache & Co. Inc.</i> 122 Ariz. 530, 531, 596 P.2d 365, 366 (1979)	12, 13
<i>Tobel v. State, Ariz. Dep't of Pub. Safety</i> , 189 Ariz. 168, 939 P.2d. 801 (App. 1997)	10

***v Statutes and Rules**

A. R.S. § 12-505	11
A. R.S. § 14-1308	8
A. R. S. §46-455	9, 11
Ariz.R.Civ.P. 15	11
Ariz. R. Civ. P.56(c)	8

***VI ABBREVIATIONS**

Appellant employs the following abbreviations in this Opening Brief:

App. Ex. ____	Appendix
Op. Br. (Page)	Appellant's Opening Brief
ROA ____	Record on Appeal as reflected in the Index filed By the Clerk of the Superior Court
APSA	Adult Protective Services Act
ARCP	Arizona Rules of Civil Procedure
ARS	Arizona Revised Statutes

***1 STATEMENT OF THE CASE**

This appeal involves the estate of Emmett C. Wytenbach ("Emmett"). Barry Wytenbach ("Barry") was appointed the Personal Representative of the Estate more than two years after Emmett's death. (ROA 8, App. Ex. 4)

On August 13, 2004, Barry as Personal Representative filed a Petition and Complaint (“Complaint”) against Nona Wyttenbach (“Nona”), Emmett’s surviving spouse, under the Adult Protective Service Act (“APSA”), alleging financial exploitation of Emmett as a vulnerable adult. (ROA 13, App. Ex. 5). On May 4, 2006, Nona filed a Motion for Summary Judgment (“Motion”) alleging that the Personal Representative had no standing to bring the APSA claim against her based on being a late-appointed Personal Representative. (ROA 58, App. Ex. 9).

On June 2, 2006, after this Court’s decision in *Estate of Winn*, 212 Ariz. 117, 128 P.3d 234 (App. 2006), which opined that a late-appointed Personal Representative could not pursue an APSA claim, Barry filed a Petition to Amend Complaint (“Amended Complaint”) in order to add himself, individually, as a beneficiary of the Estate, as a party plaintiff to the Complaint. (ROA 61, App. Ex. 12). The Amended Complaint was denied by the trial court’s Order of October 26, 2006. (ROA 74, App. Ex. 14).

*2 The Maricopa County Superior Court entered an Order on October 26, 2006 granting Nona’s Motion for Summary Judgment based upon *Estate of Winn*, 212 Ariz. 117, 128 P.3d 234 (App. 2006). (ROA 74, App. Ex. 14) That opinion has recently been overturned by the Arizona Supreme Court. *Estate of Winn*, 214 Ariz. 149, 150 P.3d 236 (Ariz. 2007).

Barry filed a timely notice of appeal from the Order granting summary judgment and a cost bond on November 21, 2006. (ROA 75 & 76).

This Court has jurisdiction pursuant to A.R.S. § 12-2101 (J).

*3 STATEMENT OF FACTS

Barry is Emmett’s only child and the residuary beneficiary of the Emmett C. Wyttenbach and Ester A. Wyttenbach Trust, dated May 29, 1984 (the “Trust”). (ROA 13, App. Ex. 5).

Emmett and Esther A. Wyttenbach (“Esther”) executed the Trust both as Trustors and as Trustees. Barry was the sole beneficiary at the time of the death of the surviving Trustor. (ROA 13, App. Ex. 5).

Esther died on July 30, 1993. (ROA 21, App. Ex. 6.).

On September 26, 1996, Emmett married Nona. (ROA 13, App. Ex. 5). On February 4, 1999, Emmett executed the First Amendment to the Trust (the “First Amendment”). Emmett executed a Second Amendment to the Trust (the “Second Amendment”) and his Last Will and Testament (the “Will”) on May 3, 2001. (ROA 1, App. Ex. 1, ROA 21 Ex. 1 & 2, App. Ex. 6).

The First Amendment gave Nona all of Emmett’s personal effects and household furnishings at the time of his death. It also acknowledged that this would be the only provision made for Nona as she had been taken care of outside of the Trust and the Will. (ROA 21, Ex. 1, App. Ex. 6).

The Second Amendment gave the Trust’s interest in a Promissory Note made by John W. Roose and Karen J. Roose on August 4, 1997 to Nona, with the *4 remainder of the Trust assets to be distributed to Barry. (ROA 21, Ex. 2, App. Ex. 4).

Emmett died on December 2, 2001. (ROA 1, App. Ex. 1).

After Emmett’s death, the Personal Representatives nominated in Emmett’s Will declined to pursue the APSA claim against Nona, and renounced their rights to appointment as Personal Representative and consented to the appointment of Barry as Personal Representative. (ROA 3 & 4, App. Ex. 2 & 3).

On May 24, 2004, Barry was appointed Personal Representative of Emmett’s Estate. (ROA 8, App. 4).

On August 13, 2004, Barry filed a Petition and Complaint claiming the financial exploitation of a vulnerable adult, A.R.S. §46-451, et seq., under APSA, within the applicable statute of limitation related to APSA claims. *Corbett v. Manocare of America*, 213 Ariz. 618, 146 P.3d 1027 (App. 2006). (ROA 13, App. Ex. 5).

Nona filed her initial Motion for Summary Judgment on June 3, 2005, alleging that Barry as Personal Representative failed to provide clear and convincing evidence of undue influence and elder abuse by Nona. (ROA 22).

Barry filed Plaintiffs Opposition to Defendant's Motion for Summary Judgment ("Opposition") on November 10, 2005, alleging that thousands of *5 dollars were transferred during the final days of Emmett's life from the Trust of which Barry was the sole beneficiary established by Barry's father and mother prior to their deaths and also from a joint bank account between Barry and Emmett, to accounts benefitting Nona, notwithstanding statements in Emmett's Will that Nona had been provided for outside of the Will and Trust therefore no further provisions would be made for her. (ROA 43, App. Ex. 7). Nona's initial Motion for Summary Judgment was denied. (ROA 55).

Nona filed a second Motion for Summary Judgment on May 4, 2006, arguing Barry as a late-appointed personal representative had no authority to bring the APSA claim and distributing the claim to Barry did not solve the problem by allowing Barry to continue the claim individually. (ROA 58, App. Ex. 9)

Barry's Response to Motion for Summary Judgment ("Response") argued that even if a late-appointed Personal Representative had no authority to bring an APSA claim, the late-appointed Personal Representative did have the authority to confirm title to any assets of the estate to the proper beneficiaries. Barry was the sole beneficiary of the Estate. Accordingly, transferring the APSA claim to Barry individually was within the authority of a late-appointed Personal Representative. The Amended Complaint would have added Barry individually as a party plaintiff, who in his own right, could pursue the APSA claim against Nona for financial *6 exploitation of a vulnerable adult. (ROA 1, App. Ex. 1, ROA 59 & 60, App. Ex. 10& 11).

On May 10, 2006, Barry as Personal Representative filed an Instrument of Distribution transferring the Estate's interest in the APSA claim to Barry, individually as beneficiary. (ROA 56, App. Ex. 8). The Instrument of Distribution was filed in response to the original *Estate of Winn* decision, which held that a late appointed Personal Representative had no authority to bring an APSA claim. By transferring the claim to Barry individually, the Complaint could be kept viable with an individual party plaintiff.

On June 2, 2006, Barry filed a Petition to Amend Complaint ("Amended Complaint"), again in response to the appellate court's decision in *Estate of Winn*, to add Barry, individually, as a party plaintiff and holder of the interest in the APSA claim pursuant to the Instrument of Distribution. (ROA 61, App. Ex. 12).

On June 27, 2006, the trial court issued a Minute Entry Ruling which stated that Barry did not have the authority to bring an APSA claim based upon the statute and the holding in *Estate of Winn*. (ROA 64, App. Ex. 13).

On October 26, 2006, the trial court signed an Order granting Nona's Motion for Summary Judgment, dismissing the Complaint with prejudice and denying Barry's Petition to Amend Complaint. (ROA 74, App. Ex. 14). The *7 unsigned Minute Entry dated June 27, 2006 concluded that this Court's decision in *Estate of Winn*, holds that a late-appointed Personal Representative has no authority to bring the APSA claim. It further concluded the Instrument of Distribution dated March 10, 2006, did not give Barry authority to bring the claim. The Amended Complaint was not granted because the trial court also concluded, improperly, that the applicable statute of limitations, A. R. S. § 46-455 had run. (ROA 64, App. Ex. 13).

ISSUES PRESENTED

1. In light of the Supreme Court's decision in *Estate of Winn*, _ Ariz. _, 150 P.3d 236 (2007), did the trial court err as a matter of law in granting Nona's Motion for Summary Judgment?

2. Is the Personal Representative barred from filing an APSA complaint by the statutes of limitation?
3. Did the trial court err as a matter of law in denying the Personal Representative's Petition to Amend Complaint?

*8 ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

A. Standard of Review.

Motions for Summary Judgment require that three (3) prerequisites must be met before entry of summary judgment is appropriate. The record before the court must show (1) that there is no genuine dispute as to any material facts, (2) that only one inference can be drawn from those undisputed facts and (3) that based upon those facts, the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56 (c). This Court is reviewing this case to determine whether the trial court correctly applied the law. Therefore, the standard of review is *de novo*. See *Andrews v. Blake*, 205 Ariz. 236, ¶12, 69 P.3d 7, 11 (2003). Statutory interpretation issues are reviewed *de novo* as well because statutory interpretation is an issue of law. See *Berry v. Alberty*, 137 Ariz. 387, 843 P.2d 1279 (App. 1992).

B. Arguments.

The trial court erred in granting Nona's Motion for Summary Judgment. The Arizona Supreme Court has recently overruled this Court's opinion in *Estate of Winn*, by concluding, “[A.R.S. § 14-3108\(4\)](#) does not preclude a late-appointed *9 personal representative from bringing an otherwise timely APSA claim under [A.R.S. §46-455\(B\)](#) on behalf of a deceased victim's estate.” *Estate of Winn*, 214 Ariz. 149, 150 P.3d 236, 240 (2007). The Supreme Court also held that the legislative intent of [A. R. S. §14-3108\(4\)](#) was not to apply the limitations found in the Rules of Civil Procedure and Evidence towards subsections (O) and (P) of Section 46-455(P). *Id.* at ¶18.

Barry's Complaint alleged he had standing to bring the Complaint under [A.R.S. §46-455\(P\)](#).

The Supreme Court noted in *Estate of Winn*, “that efficient administration and finality are not ends in themselves, but rather are intended to protect the decedent's successors and creditors from disruptions to possession of decedent's property.” *Id.* at ¶20.

Nona's Motion for Summary Judgment relied on this Court's Opinion in *Estate of Winn* and the trial court granted the motion based up it. However, that Opinion has been vacated and remanded by the Supreme Court. The trial court therefore misapplied the law and abused its discretion in granting the Motion.

The Supreme Court in *Lowry v. Industrial Commission of Arizona*, 195 Ariz. 398, ¶18, 989 P.2d 152, ¶18 (1999), addressed retroactivity of decisions in Arizona cases as follows:

*10 ¶ 18 Finally, we address the issue of retroactivity. “In civil actions, Arizona law has always been ‘that unless otherwise stated, a court opinion operates retroactively as well as prospectively.’” *Brannigan v. Raybuck*, 136 Ariz. 513, 520, 667 P.2d 213, 220 (1983) (quoting *Chevron Chem. Co. v. Superior Court*, 131 Ariz. 431, 435, 641 P.2d 1275, 1279 (1982)). This concern again mirrors a question we considered in *Wiley*. As we stated there, we presume retroactivity of today's holding, yet balance that application against the following factors:

1. Whether the decision establishes a new legal principle by overruling clear and reliable precedent or by deciding an issue whose resolution was not foreshadowed;

2. Whether retroactive application will further or retard operation of the new rule, considering the prior history, purpose, and effect of the new rule;
3. Whether retroactive application will produce substantially inequitable results."

None of the listed factors would negate the retroactivity of the Supreme Court's decision in *Estate of Winn* as applied to this case. That decision therefore should be applied here as well.

This Court's decision in *Estate of Winn* was an aberration in the application of Probate Code Rules to deny the prosecution of cases under APSA.

II. THE STATUTE OF LIMITATIONS DID NOT BAR THE PERSONAL REPRESENTATIVE FROM FILING THE COMPLAINT.

A. Standard of Review.

The Court must review the statutory construction of statutes of limitations. Therefore, the standard of review is *de novo*. See *Johnson v. Johnson*, 195 Ariz. 389, 391, ¶9, 988 P.2d 612, 623 (App. 1999); *11 *Tobel v. State, Ariz. Dep't of Pub. Safety*, 189 Ariz. 168, 173-174, 939 P.2d. 801, 806-07 (App. 1997); *Great Am. Mortgages Ins. Co. v. Statewide Ins. Co.*, 189 Ariz. 123, 125, 938 P.2d 1124, 1126 (App. 1997).

B. Arguments.

Nona's Motion for Summary Judgment asserted that the APSA claim made in Barry's Complaint lapsed due to the fact that he was appointed as Personal Representative more than two years after Emmett's death. However, the Arizona Supreme Court in the *Estate of Winn* found that a late-appointed personal representative is not precluded from pursuing an elder abuse claim on behalf of a decedent's estate. *Estate of Winn*, 150 P.3d at 237, ¶1. The Estate's claim accrued no earlier than either the time of Emmett's death December 2, 2001, or the time of the later discovery of the improper transfers after Emmett's death and prior to the filing of the Complaint. A.R.S. § 46-455(K). The Estate then had seven years to file an APSA Complaint under A.R.S. § 46-455.

That limitation period was reduced by the 2003 amendment of A. R. S. § 46-555. Under A. R. S. § 12-505(c) the Estate had until September 18, 2004, one year from the effective date of the amendment reducing the statute of limitations from seven years to two years, to file its Complaint. The Personal Representative filed the Complaint on August 13, 2004, within that one-year period. See *12 *Corbett v. Manorcaren of America*, 146 P.2d 1027, 1037 (2006); *City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544, ¶42, 105 P.3d 1163, 1173 (2005). Accordingly, Barry's Complaint was timely as a matter of law and the trial court erred in granting summary judgment on this ground.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN NOT ALLOWING THE PERSONAL REPRESENTATIVE TO AMEND THE COMPLAINT TO ADD A PARTY PLAINTIFF.

A. Standard of Review.

The standard of review for a denial of a request to amend a pleading pursuant to Arizona Rules of Civil Procedure Rule 15 is to review the denial for a clear abuse of discretion. Furthermore the misapplication of the law can constitute an abuse of discretion. See *Owens v. Superior Ct.*, 133 Ariz. 75, 79, 649 P.2d 278, 282 (1982), *Bishop v. State Dep't of Correction*, 172 Ariz. 472, 474-75, 837 P.2d 1207, 1209-1210 (App. 1992), *Spitz v. Bache & Co. Inc.* 122 Ariz. 530, 531, 596 P.2d 365, 366 (1979).

B. Arguments.

Ariz. R. Civ. P. 15(a) provides that a pleading may be amended after a responsive pleading is served only by leave of court. According to *Owens v. Superior Ct.*, 133 Ariz. 75, 79, 649 P.2d 278, 282 (1982), leave to amend is discretionary with the court but should be liberally granted. *13 *Bishop v. State Dep't of Correction*, 172 Ariz. 472, 474-75, 837 P.2d 1207, 1209-1210 (App. 1992), also permits amendments unless the court finds undue delay in the request, bad faith, undue prejudice, or futility in the amendment. If those circumstances are not found, leave to amend a pleading should be granted “[i]f the underlying facts or circumstances relied upon ... may be a proper subject of relief.” *Spitz v. Bache & Co. Inc.* 122 Ariz. 530, 531, 596 P.2d 365, 366 (1979).

Here, the trial court denied Barry's request to amend the complaint based upon its assertion that the statute of limitations had run. In doing so, it improperly applied the effect of a reduced statute of limitations, for the reasons stated in Arguments II(B), *supra*.

CONCLUSION

Based upon the foregoing, the trial court's Order granting Defendant's Motion for Summary Judgment should be reversed. This case should be remanded to the trial court, and the Complaint and the Amended Complaint should be heard and decided on the merits in light of the findings in *Estate of Winn* Ariz. 150 P.3d 236 (2007).

Appendix not available.